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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 854

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Petitioner,

vs.

MRS. VOLNEY W. TAYLOR, VOLNEY W. TAYLOR, J. L. GRAY AND SABINE ROYALTY CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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OCTOBER TERM, 1940

No. 854

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Petitioner and Appellant below,

vs.

MRS. VOLNEY W. TAYLOR, VOLNEY W. TAYLOR, J. L. GRAY AND SABINE ROYALTY CORPORATION,
Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matters Involved.

Under date of August 22, 1934, Mrs. Volney W. Taylor, one of the respondents herein, and others, executed and

delivered to J. L. Gray, also a respondent, an oil and gas lease covering lands in Hidalgo County, Texas (R. 27-34), said lease providing for the usual and customary lessors' royalty—one-eighth (1/8) of the oil, gas and casinghead gas produced and saved from the leased premises. The lease became known and will be referred to herein as the Taylor-Seabury lease. At the time this action was instituted in the United States District Court for the Southern District of Texas, respondents Mrs. Volney W. Taylor and Sabine Royalty Corporation owned as undivided one-eighth (1/8) interest each in said royalty, or an undivided one sixty-fourth (1/64) interest in all oil, gas and other minerals produced from the leased premises (R. 13, 25 and 26).

By an instrument in writing bearing date of October 25, 1934 (R. 160-164), respondent Gray assigned said oil and gas lease to petitioner Phillips Petroleum Company. The assignment recites as consideration therefor the sum of $10.00 and other valuable considerations. *The record is silent as to the actual cash consideration passing from assignee to assignor for the lease in question but the instrument bears canceled revenue stamps in the amount of $19.00* (R. 163) thereby indicating that such consideration was between $18,500.00 and $19,000.00. The assignment contains the following language:

> "Assignor hereby excepts from said assignment one-fourth (1/4) of seven-eighths (7/8) of the first oil produced and saved, and one-fourth (1/4) of seven-eighths (7/8) of the net proceeds received at the well for gas marketed from said premises, under the terms and provisions of said lease, until Assignor shall have realized therefrom, on the price basis set out below, Eighteen Thousand Seven Hundred fifty ($18,750.00) Dollars."

At the time of the institution of this action, respondent Gray owned only one-half (1/2) interest in said oil payment (R. 13, 25 and 26) and the sum of $6,119.92 remained to be paid

thereon before said interest would be fully satisfied and discharged (R. 13 and 74).

In the latter part of 1936 and in 1937, production was obtained on adjacent premises, known as the "Guerra 'A' Lease." Although petitioner did develop the lease under which respondents owned their interests by drilling three wells thereon (R. 113), it did not offset two wells on the adjacent Guerra lease for the reason that its geologists concluded said offset wells could not be drilled and operated profitably (R. 116-127).

Respondents, two of them, Mrs. Volney W. Taylor and Sabine Royalty Corporation, owners of royalty interests created and reserved by the oil and gas lease of August 22, 1934, and the third, J. L. Gray, owner of a one-half interest in the oil payment excepted by the lease assignment of October 25, 1934, joined in filing this action on April 29, 1939, seeking damages from the petitioner in the aggregate sum of $20,500.00 by reason of its failure to offset producing wells on the adjacent Guerra lease and thus protect the leased premises against drainage of oil (R. 6-8). The complaint charges that 35,000 barrels of oil had been drained from the Taylor-Seabury lease at the time the action was instituted, said oil having a value of $1.00 per barrel; that the respondent refused to produce 60,000 barrels of oil remaining under the leased premises, said oil having a value of 90 cents per barrel; that the respondent Taylor owned one-eighth (1/8) of the one-eighth (1/8) royalty interest, or one sixty-fourth (1/64) of all oil, gas and casinghead gas produced from the leased premises; that the respondent Sabine Royalty Corporation owned a like interest and that the respondent Gray owned an oil payment on which a sum in excess of Six Thousand Dollars remained due and owing (R. 6-8). Thus it is alleged by respondents that the total value of the oil drained and to be drained from the leased premises is $89,000.00. Of that amount, respondents Tay-

lor and Sabine Royalty Corporation allege they are entitled to only one sixty-fourth (1/64) each, or $1,390.63. Obviously, respondent Gray's claim exceeds the sum of Three Thousand Dollars (R. 6-8).

The case was tried to a jury charged by the court, in part, as follows:

> "I charge you gentlemen that under the pleadings there is no difference of the parties nor is there in the Court's mind as to how any amount should be apportioned. So you need not in your verdict apportion this much to this plaintiff and this much to this plaintiff and so on. You just merely find a figure which covers the damages if any by reason of the failure which you may have found under the first division of this charge and then the parties, in writing a judgment on that verdict, will apportion it as evidenced by the pleading and stipulation." (R. 171)

The jury rendered a verdict for the plaintiffs and assessed the damages in the sum of $4,000.00. The judgment of the trial court was affirmed on appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 263 and 291).

II.

Reasons Relied On for Allowance of the Writ.

1. The Circuit Court of Appeals held that the *owners of royalty interests reserved in an oil and gas lease,* whose aggregate claims were less than $3,000.00, may join with the *owner of an oil payment created by an assignment of the oil and gas lease,* whose claim exceeds $3,000.00, in a suit in the Federal Court, on the ground of diversity of citizenship, against the assignee of the oil and gas lease for damages for failure to protect the leased premises from drainage. This is a decision of a federal question which is in conflict with applicable decisions of this court.

2. The Circuit Court of Appeals held that an implied covenant to protect the leased premises from drainage exists against the assignee of an oil and gas lease in favor of an assignor of said lease who reserves a portion of the oil and gas until he receives from the proceeds thereof a certain sum (known as an oil payment). This is an important decision of local law in a way that probably conflicts with applicable decisions of the state in which the cause of action arose and was tried.

3. In reaching the conclusion stated in numbered paragraph 2, the Circuit Court of Appeals assumed, contrary to the facts disclosed by the record, and relied upon the assumption, that the oil payment reserved in the assignment of the oil and gas lease was the sole consideration for such assignment.

III.

The Record.

Your petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, ordering said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fifth Circuit had in case numbered 9421 on its docket, entitled *Phillips Petroleum Company, Appellant*, v. *Mrs. Volney W. Taylor, Volney W. Taylor, J. L. Gray and Sabine Royalty Corporation, Appellees*, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; that the judgment of

said Circuit Court of Appeals herein be reversed by this Court and that petitioner have such further relief as to this Court may seem proper.

Dated March 12, 1941.

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